
NOTE

JUDICIAL SELECTION IN ALASKA: JUSTIFICATIONS AND PROPOSED COURSES OF REFORM

This Note evaluates the merit system of judicial selection, retention, and evaluation in Alaska and suggests a variety of potential reforms in light of the ongoing debate over how best to balance the competing values of judicial independence and accountability. This Note describes the historical and political context in which Alaska's system of merit selection was adopted and evaluates the arguments for and against merit selection, assessing the concept's strengths and weaknesses in light of the experiences of Alaska and other states. The Author responds to criticisms of Alaska's merit selection system by offering four potential modifications designed to provide for meaningful judicial accountability without sacrificing judicial independence.

I. INTRODUCTION

Since even before the founding of our nation, there has been disagreement regarding the appropriate method of selecting judges in a democracy. Over the centuries, this debate has focused on determining the appropriate balance between the competing values of judicial independence and judicial accountability. The choice of a particular method for selecting the judges who will interpret and apply the law implicates one of the fundamental principles at the heart of democratic theory—the equal, blind, and fair administration of justice. As Alaska weighed these issues on the eve of statehood in 1956, it had the benefit of almost two centuries of federal and state experience in judicial selection. After much debate and consideration, delegates to the Alaska Constitutional Convention adopted the merit selection model for selecting judges. This system

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of judicial selection, retention, and evaluation, which involves non-partisan commissions presenting a list of qualified applicants to the governor for appointment, remains largely unchanged and continues to serve Alaska to this day.

Alaska's system, however, has not been free of controversy. The debate over judicial selection in Alaska has paralleled the ongoing struggle across the nation to achieve a judiciary that is both independent and accountable. This Note evaluates the arguments for and against merit selection of judges and the historical development of and justifications for Alaska's particular version of the merit selection model. Almost half of a century removed from the Alaska Constitutional Convention, this Note is intended to serve both as a critical assessment of the performance of merit selection in Alaska and as a reevaluation of the strength of the merit selection concept in light of the experiences of Alaska and other states. The Note concludes that merit selection remains the most appropriate and effective method of judicial selection, but recommends that Alaska consider a series of minor reforms in order to ensure that judges are held accountable to the public they serve.

II. THE HISTORICAL DEBATE OVER JUDICIAL SELECTION

Montesquieu argued that because the judiciary is the weakest of the three departments of power, "there is no liberty, if the power of judging be not separated from the legislative and executive powers."¹ Alexander Hamilton concurred with Montesquieu in the primacy of judicial independence and argued that it was so important as to justify life appointment and salary protection for federal judges.² "[N]othing will contribute so much . . . to that independent spirit in the judges," Hamilton argued, as "the permanent tenure of judicial offices."³

Many, however, strongly disagreed with Hamilton's position. The anti-Federalist writer Brutus was appalled by the amount of power vested in the United States Supreme Court with little corresponding accountability.⁴ "In short, [Supreme Court justices] are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel

1. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, Book XI, Ch. VI 202 (David Wallace Carrithers ed., Univ. of Cal. Press 1997) (1748).

2. *THE FEDERALIST* No. 78, at 526-27 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

3. *Id.*

4. Brutus XV, *The Problem of Judicial Review*, in *READINGS IN AMERICAN GOVERNMENT* 325 (Mary P. Nichols & David K. Nichols eds., 1990).

themselves independent of heaven itself.”⁵ Thomas Jefferson believed that it was critically important that the judiciary remain independent of the other branches of government, but that it was equally imperative that judges remain accountable to the nation.⁶ He believed that “judges should face the public from time to time to ensure they remained true to their constitutional oaths.”⁷ “A judiciary independent of a king or executive alone, is a good thing,” Jefferson opined, “but independence of the will of the nation is a solecism, at least in a republican government.”⁸

Hamilton’s view prevailed in the U.S. Constitution⁹ and, initially, at the state level as well. The first twenty-nine states to enter the Union had appointed judiciaries.¹⁰ However, influenced by the populist views of Jefferson and Andrew Jackson, who was known to refer to judges as “politicians who hide their politics under their robes,”¹¹ the trend soon shifted toward election of state judges. In 1832, Mississippi became the first state to elect appellate judges, and every state that entered the Union between 1846 and 1912 provided for judicial elections.¹² This trend concerned many who espoused the importance of judicial independence.¹³ In 1835, Alexis de Tocqueville observed that

[s]ome [state] constitutions make the members of their courts *elective* and subject them to frequent elections. I dare to predict that these innovations will sooner or later have disastrous results and that one day it will be seen that by diminishing the independence of the judges in this way, not only was the judicial power attacked, but the democratic republic itself.¹⁴

During the 20th century a majority of states returned to judicial appointment by governors, legislators, or both.¹⁵ Beginning in 1940, many states combined judicial appointments with some form of merit selection process and retention elections.¹⁶ Today, gover-

5. *Id.*

6. Troy A. Eid, *Judicial Independence and Accountability: The Case Against Electing Judges*, COLO. LAW., Jul. 2001, at 71.

7. *Id.*

8. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in THOMAS JEFFERSON, WRITINGS 1445, 1446 (Merrill D. Peterson ed., 1984).

9. U.S. CONST. art. III.

10. Eid, *supra* note 6, at 71.

11. *Id.*

12. *Id.*

13. *Id.*

14. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 122-23 (Sanford Kessler ed., Hackett Publishing Co., 2000) (1835).

15. Eid, *supra* note 6, at 7.

16. *Id.*

nors directly fill vacancies on the highest appellate courts in twenty-eight states, but in all but four of those states, governors are required to appoint from slates provided by nominating commissions.¹⁷ Fifteen states use some form of merit selection in nominating candidates for judicial appointments.¹⁸ Twenty-one states still hold judicial elections (nine partisan, twelve non-partisan), and Virginia provides for election of its supreme court justices by the legislature.¹⁹ The governors of eighteen states have discretion for trial courts while nominating commissions recommend slates for the governor in twenty-seven states.²⁰

III. JUDICIAL SELECTION IN ALASKA

A. Alaska's Merit Selection System

The "merit selection" plan was first conceived in 1913, but not adopted in any form by a U.S. state until Missouri voted for it in 1940.²¹ Merit selection of judges is still referred to as the "Missouri Bar Plan" or the "Missouri plan."²² Generally, merit selection systems use a non-partisan nominating commission of lawyers and non-lawyers to identify and evaluate candidates for judicial positions. These commissions then present a list of the two or three most qualified applicants to the appointing authority (usually the governor), who chooses one candidate to appoint to the bench. Judges are then subject to evaluation by the commission and the general public and are periodically required to appear on the ballot for a "retention" vote.

Alaska incorporated its method of judicial selection into its constitution upon statehood in 1956. The Alaska Constitution es-

17. Sourcebook of Criminal Justice Statistics 2001 Online, <http://www.albany.edu/sourcebook/1995/pdf/t170.pdf> (last visited Dec. 4, 2001). The states providing for direct gubernatorial appointment are California, Maine, New Hampshire, and New Jersey.

18. Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 75 (1997). The states include Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Utah, and Wyoming. *Id.* at 75 n.25.

19. Sourcebook of Criminal Justice Statistics 2001 Online, *supra* note 17.

20. *Eid*, *supra* note 6, at 7.

21. Honorable Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 318 (1997).

22. Honorable B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1442, Appendix (2001).

tablished the Alaska Judicial Council²³ to nominate candidates for judgeships at all four levels of state court.²⁴ The Council provides a list of at least two qualified applicants to the governor, who then appoints one individual from that list to fill an existing or impending vacancy.²⁵ After an initial term of three years, all Alaska judges must stand in a retention election.²⁶ The particular judge is not opposed by another candidate, and voters are presented with only a “yes” or “no” choice.²⁷ If retained by voters, judges then serve a full term of a specified length before they stand for retention again.²⁸

The Council is made up of seven individuals: three attorney members appointed by the Alaska Bar Association Board of Governors; three non-attorney members appointed by the governor and confirmed by a majority of the members of the legislature in joint session; and the Chief Justice of the Alaska Supreme Court, who serves as the *ex officio* chair.²⁹ The Alaska Constitution requires that Council appointments be made “with due consideration to area representation and without regard to political affiliation.”³⁰

In addition to evaluating applications and nominating candidates for judicial vacancies, the Council has two additional duties. The Alaska Constitution requires the Council to conduct studies and recommend improvements in the administration of justice,³¹ and various statutes charge the Council with evaluating the per-

23. ALASKA CONST. art. IV, § 5.

24. ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE: A PROFILE OF ALASKA’S JUDICIAL APPLICANTS AND JUDGES 5 (May 1999) [hereinafter FOSTERING JUDICIAL EXCELLENCE].

Alaska has a unified court system, meaning there are no local or county courts. The constitution establishes the supreme court and the general-jurisdiction trial court and gives the legislature authority to establish other courts. ALASKA CONST. art. IV, §§ 1-3. Since statehood, the legislature has created two other courts by statute—a limited-jurisdiction trial court (the district court), ALASKA STAT. § 22.15.010 (Michie 2002), and an intermediate court of criminal appeals (the Alaska Court of Appeals), *Id.* § 22.07.010.

25. ALASKA CONST. art. IV, § 5.

26. *Id.* § 6.

27. *Id.*

28. Following retention, supreme court justices serve a term of ten years, court of appeals judges serve for eight years, superior court judges serve for six years, and district court judges serve for four years. *See id.* § 6; ALASKA STAT. § 15.15.030(10) (Michie 2002).

29. ALASKA CONST. art. IV, § 8 (noting that members serve six-year staggered terms, except for the Chief Justice, who serves for three years).

30. *Id.*

31. *Id.* § 9.

formance of judges and making that information available to the public.³² The Council may, but is not required to, make recommendations to voters as to whether a particular judge should or should not be retained in office.³³

B. Dissent in Alaska

As in other areas of the nation, not everyone in Alaska is happy with their system of judicial selection. Many Alaskans believe that the state's system of judicial selection does not allow for enough public input, either through contested judicial elections or legislative confirmation of appointed judges.³⁴ Others have the perception that judges are abandoning their constitutional roles as interpreters of the law and have begun writing law, an essentially legislative function that should be responsive to public opinion.³⁵ These sentiments are consistent with a nationwide growth in support of the concept of a judiciary accountable to the people.

Advocates of increased accountability for Alaska's judges cite a number of cases as examples of an overly active judiciary. For example, in *Area G Home & Landowners Org., Inc. v. City of Anchorage*,³⁶ the Alaska Supreme Court interpreted a provision of Anchorage's municipal charter so as to allow the city to expand its police service area to include a new community (and impose accompanying municipal taxes) without affording the residents of the area a separate vote on the annexation.³⁷ Another example is *Bess v. Ulmer*,³⁸ which rejected a ballot initiative limiting prisoners' rights as an inappropriate constitutional "revision" and deleted portions of a ballot initiative amending the Alaska Constitution to

32. ALASKA STAT. § 22.05.100 (duty to provide information to public on retention of supreme court justice), § 22.07.060 (duty to provide information to public on retention of court of appeals judge), § 22.10.150 (duty to provide information to public on retention of superior court judge), § 22.15.195 (duty to provide information to public on retention of district court judge).

33. FOSTERING JUDICIAL EXCELLENCE, *supra* note 24, at 11.

34. See, e.g., Senator Robin Taylor, Sponsor Statement for SJR 22, April 4, 2001, available at <http://www.akrepublicans.org/22ndleg/spst/spstsjr022.shtml> (last visited Jan. 30, 2003).

35. Press Release, Alaska Senators Loren Leman and Dave Donley, Resolution Proposes Increased Accountability from Judiciary (Mar. 5, 1999), available at <http://www.akrepublicans.org/preleman103051999.htm> (last visited Oct. 10, 2001) [hereinafter Press Release].

36. 927 P.2d 728 (Alaska 1996).

37. *Id.* at 733-39.

38. 985 P.2d 979 (Alaska 1999).

prevent the state from recognizing same-sex marriages.³⁹ Critics often cite these cases and others as evidence of the unresponsive nature of the Alaska judiciary and the dire need for holding judges accountable for their decisions on the bench.⁴⁰

Several recent legislative efforts appear to be manifestations of a growing suspicion and distrust of Alaska's courts. In 1999, a proposed constitutional amendment was introduced that would have significantly altered the system of judicial selection and retention.⁴¹ Senate Joint Resolution 15 sought to increase the frequency of retention elections and proposed to discontinue the practice of limiting the governor's judicial appointees to those nominated by the Judicial Council.⁴² Instead, the amendment would have allowed the governor to appoint any licensed attorney in Alaska to fill a judicial vacancy subject to confirmation by a joint session of the legislature.⁴³ In 2001, another proposal would have reduced the term lengths of supreme court justices from ten years to six and the terms of superior court judges from six years to four.⁴⁴ Most recently, a 2002 bill currently under consideration by the Senate Judiciary Committee would reduce the term lengths of Court of Appeals judges from eight years to six.⁴⁵

IV. ASSESSING THE MERITS OF MERIT SELECTION

A. Arguments in Favor of Merit Selection

Since 1940, fifteen states and the District of Columbia have adopted merit selection for all levels of their respective judicial systems⁴⁶ and no state has ever abandoned a system of merit selection. Merit selection is often cited as an ideal to aspire to by reformers in states that continue to choose judges by popular elections.⁴⁷ For example, before becoming the Federal Director of Homeland Se-

39. *Id.* at 987-89.

40. See Press Release, *supra* note 35; see generally Dave Donley et al., Bess v. Ulmer—*The Supreme Court Stumbles and the Subsistence Amendment Falls*, 19 ALASKA L. REV. 295 (2002).

41. S.J. Res. 15, 21st Leg., 1st Sess. (Alaska 1999).

42. *Id.*

43. *Id.*

44. S.J. Res. 22, 22d Leg., 1st Sess. (Alaska 2001).

45. S.B. 159, 22d Leg., 2d Sess. (Alaska 2002).

46. Stephan Shapiro, *The Judiciary in the United States: A Search For Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 674 n.57 (2001).

47. Geoff Yuda, *An Election, A Coming Succession of Chief Justices and the Debate Over Merit Selection Will Influence the Future Course of Pennsylvania's Supreme Court*, PA. LAW., July-Aug. 2001, at 18-19.

curity, Governor Tom Ridge strongly supported the adoption of a merit selection system in Pennsylvania.⁴⁸ Ridge and other proponents of merit selection cite the unique nature of the judiciary that distinguishes judicial elections from executive and legislative elections. “[W]e cannot ask the people to make good judgments on judicial candidates,” Ridge argued, “when we expressly prohibit those candidates from sharing their views on the issues.”⁴⁹ Over the years, a number of arguments have developed in favor of merit selection.

1. *Judicial Independence.* Merit selection systems are built largely upon the ideals expressed by the Federalists and embodied in the U.S. Constitution. The primary aim of merit selection is to ensure judicial independence by removing judges from the political arena.⁵⁰ Nonetheless, merit selection systems generally allow for more judicial accountability than the Federalists envisioned by requiring that judges stand for retention elections. Retention elections are intended to eliminate the partisan, combative elements that characterize contested elections. The idea is that the individual judge runs only against himself and is judged by the voters based on his record instead of his party affiliation or campaign promises. The absence of an opponent reduces the pressure or incentive to make unethical or inappropriate campaign statements in the hopes of attracting voters.

Merit selection also provides a degree of independence that the federal system of life appointment does not provide. Systems of merit selection similar to Alaska’s diminish the link between judges and the executive that appointed them. Under the federal system, the President is free to choose any candidate that he thinks the Senate will confirm. Under the merit system, the governor is limited in his appointment power by the list of candidates provided by the nominating commission. Therefore, federal judges are more directly indebted to the executive for their office than judges appointed under the merit system. Although federal judges, especially Supreme Court justices, have often diverged from the ideological course anticipated by the President that nominated them, Presidents do select judges that they perceive to be in line with their views and have tried to “pack” the federal courts so as to gain favorable rulings on certain policies. Under the merit system, such

48. *Id.*

49. *Id.* at 20.

50. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 309-10 (2002); Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 31 (1995).

efforts at executive control over the judiciary would be much more difficult.

2. *Providing for a High Quality Judiciary.* The idea behind merit selection is to take politics out of the judicial selection process and ensure that only the most highly qualified individuals are considered for nomination to the bench. In 1956, Alaska adopted its version of the merit system in an effort to ensure a “strong, fearless, and independent judiciary.”⁵¹ The Judiciary Committee of the Alaska Constitutional Convention aspired to formulate a system of judicial selection based on prior precedent and experience that would minimize political considerations, attract good candidates, and ensure the quality of the appointed judges.⁵² Alaska’s merit selection system was based largely on the Missouri Plan⁵³ and was intended to be “a combination of the appointive and the elective.”⁵⁴

3. *Removing Political Considerations from Judicial Decision-Making.* Merit selection is intended to remove political considerations from the host of factors that judges consider when rendering decisions. Fair and equal justice is threatened when judges are tempted to decide cases in accord with what result will garner the most support among the electorate and produce the least degree of impassioned response by a future campaign opponent. As United States Supreme Court Justice Sandra Day O’Connor recently noted, “if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case.”⁵⁵ It is possible that contested judicial elections could lead to good judges being voted out of office on the basis of a single controversial and highly publicized decision.⁵⁶ For example, in 1967, Wisconsin Supreme Court Justice George Currie was defeated in his re-election campaign largely as a result of his

51. Alaska Judicial Council, Alaska Constitutional Convention Minutes Concerning Judicial Selection and Retention 607 (1956), available at <http://www.ajc.state.ak.us/general/akccron.htm> [hereinafter Minutes].

52. *Id.* at 584-86, 588.

53. *Id.* at 584; MO. CONST. art. V, § 25.

54. *Minutes*, *supra* note 51, at 585.

55. *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2542 (2002) (O’Connor, J., concurring).

56. See, e.g., Paul J. DeMuniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387-88 (2002) (“Just as alarming is the increasingly blatant partisan attacks launched on courts and judges during judicial campaigns and following controversial decisions.”).

vote in a 1965 case⁵⁷ allowing Milwaukee's major league baseball team, the Braves, to move to Atlanta.⁵⁸ Currie's opponent, Milwaukee circuit judge Robert Hansen, used the Braves case to bring public attention to an otherwise uncontroversial campaign, and even received endorsements from popular former Braves players Johnny Logan and Eddie Matthews.⁵⁹

4. *Avoiding Campaign Finance Issues and the Appearance of Impropriety.* Another factor often cited in support of merit selection systems is the growing influence of money in politics. Across the United States, spending in every form of judicial race has increased significantly. In 1986, two partisan supreme court races in Alabama cost a total of \$237,281; in 1996, that total increased to more than \$2 million.⁶⁰ In 1980, the non-partisan race for Ohio chief justice cost \$100,000; in 1986, it cost \$2.7 million.⁶¹

Equally disturbing is the source of most of that money. One study found that from 1979 to 1997, the legal community (lawyers, legal political-action committees, and law firms) contributed more than 62% of the approximately \$12.8 million raised for thirty-five competitive Pennsylvania Supreme Court elections.⁶² Because attorneys are invariably the segment of the population most interested in judicial elections, they are also considerably more likely to make contributions to judicial campaigns. Judicial elections force judges to rely on the contributions of the same individuals on whose motions and arguments they will be ruling, creating a perception of impropriety. A 1993 opinion poll conducted by the University of Cincinnati's Institute for Policy Research found that 58% of Ohio voters believed that contributions influenced judicial decision-making.⁶³ Similar polls found that 70% of voters in North Da-

57. *Wisconsin v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 18 (Wis. 1966) (holding that the Braves' move to Atlanta did not violate Wisconsin antitrust laws).

58. Michael Koehler, *Baseball, Apple Pie and Judicial Elections: An Analysis of the 1967 Wisconsin Supreme Court Race*, 85 MARQ. L. REV. 223, 223-24 (2001).

59. *Id.* at 237.

60. Scott William Faulkner, *Still on the Backburner: Reforming the Judicial Selection Process in Alabama*, 52 ALA. L. REV. 1269, 1276 (2001).

61. Mark Hansen, *A Run for the Bench*, 84 A.B.A. J., Oct. 1998, at 69.

62. James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 JUDICATURE 10, 16-17 (2000) (finding that the legal community accounted for 90% of the money that could be linked to an economic sector).

63. *Cited in* *Suster v. Marshall* 149 F.3d 523, 531 (6th Cir. 1998).

kota and 56% of voters in Louisiana believed that judges were influenced by campaign contributions.⁶⁴

The paradigm state for the negative effect of money on judicial integrity appears to be Texas.⁶⁵ More than 40% of the money raised for the campaigns of the seven winning candidates for the Texas Supreme Court in 1994 and 1996 came from lawyers with cases pending before the court.⁶⁶ In a recent Texas poll, 83% of respondents said they thought the decisions of Texas judges were either strongly or somewhat influenced by campaign contributions.⁶⁷ Even more disturbing, in one poll, 48% of Texas judges admitted that contributions influenced judicial decisions.⁶⁸

In a world of big money politics, merit selection is justified as an appropriate compromise between the competing values of judicial independence and judicial accountability. The benefits of merit selection are that: (1) it insulates judges from the burdens and pressures of competitive elections; (2) it emphasizes individual qualifications instead of political power or influence; (3) it provides a screening process that ensures the governor's appointment power is limited; (4) it promotes judicial stability; and (5) it allows for accountability and democratic participation by requiring that judges stand for retention elections. In theory, merit selection provides the best of both worlds. The nomination process ensures quality while retention elections ensure integrity.

B. The Arguments Against Merit Selection

In practice, merit selection has proven to be far from the perfect method that some envisioned. Ultimately merit selection cannot achieve its primary goal of an apolitical judiciary because politics inevitably permeate any situation where coveted positions are at stake. Moreover, retention elections have not succeeded in creating a non-competitive, influence-free method of providing for a publicly accountable judiciary. The experiences of many states with merit selection demonstrate that merit systems and retention

64. Dale Wetzel, *North Dakota Residents Support Courts, But with Reservations*, BISMARCK TRIB., Nov. 17, 1999, at 6C; Michelle Millhollon, *Poll: Funds Can Sway Louisiana Judges*, ADVOCATE (Baton Rouge, La.), Jan. 10, 2000, at 1-A.

65. See generally, *Payola Justice: How Texas Supreme Court Justices Raise Money from Court Litigants*, available at http://www.tpj.org/reports/payola/_intro.html (last visited Jan. 9, 2003) (discussing the links between campaign contributions and the docket of the Texas Supreme Court).

66. Eid, *supra* note 6, at 72.

67. *Id.*

68. Peter A. Joy, *Insulation Needed for Elected Judges*, 22 NAT'L L.J., Jan. 10, 2000, at A19.

elections do not eliminate, but instead alter the problems associated with judicial selection.

Merit selection, of course, does not take the politics out of judicial selection. Instead, it only changes the politics involved in the selection process. Even the staunchest advocates of merit selection concede that politics enter into the process to a certain extent.⁶⁹ Missouri, the birthplace of merit selection, has had its own problems with political manipulation of the selection process. In 1984, the governor of Missouri allegedly collaborated with the state's judicial nominating commission to manipulate the selection process and appoint his Chief of Staff, who had no judicial experience, to the Missouri Supreme Court.⁷⁰ One Missouri state court judge described the selection process as "too secretive, undemocratic, not representative, too political, and not accountable or responsive to the public."⁷¹ Some have even contended that merit selection systems discriminate against minority candidates.⁷²

The problems experienced in Missouri and the criticism expressed by some commentators highlight merit selection's failure to remove politics from the judicial selection process. A merit system of choosing judges eliminates the public spectacle of a contested popular election, but it does not eliminate the potential for subtler and more corrupting political influences, including money, cronyism, and political activism. The limited number of people involved in merit systems like Alaska's actually increases the potential for secretive deals and private collaboration.

Compounding the problem of private political dealings is the general lack of public knowledge of and interest in judicial races. State judicial elections in general have never been traditional firestorms of excitement or controversy. The "benevolent public" has historically re-elected incumbents due more to the lack of an apparent reason to vote the judge out, than for any affirmative reason to reward the judge with another term.⁷³ Judicial retention elections are generally less visible than contested elections, making them even more prone to problems related to an uninformed public.⁷⁴ Lack of voter information about judicial candidates has be-

69. See, e.g., Minutes, *supra* note 51, at 594, 601.

70. See Daugherty, *supra* note 21, at 328.

71. *Id.* at 341.

72. *Id.* at 340 (stating that the Missouri merit system has been challenged under the Voting Rights Act on the grounds that it "results in under-representation of minorities"); Rene A. Torrado, Jr., *The Challenge of Merit Selection*, 10 CBA REC. 10, 10-11 (Apr. 1996).

73. Dann & Hansen, *supra* note 22, at 1437.

74. *Id.* at 1437-38.

come a growing concern both among commentators and the general public.⁷⁵ A series of Alaska statutes imposes a significant duty on the Alaska Judicial Council to evaluate judicial candidates and convey that information to the voting public.⁷⁶ Yet despite Alaska's status as a national leader in providing voter information, a study of the 1996 retention elections revealed that only 58% of Alaska voters were aware of the judicial performance evaluation reports made available by the Alaska Judicial Council.⁷⁷ The report also revealed that even fewer voters (approximately 33% in Anchorage) actually used the reports in making their voting decision.⁷⁸

In many instances, merit selection coupled with retention elections has not successfully avoided the modern problems that plague systems of judicial election. For example, a retention election actually holds the record for spending in a judicial election.⁷⁹ In the 1986 California Supreme Court retention elections, three justices and their opposition spent a combined \$11.5 million (\$17.5 million when adjusted for inflation).⁸⁰ It made no difference that California used a merit selection system⁸¹ or that the justices were running unopposed. Alabama Supreme Court Justice Harold See has observed that "the same problems of tone and large expenditures are present—perhaps in an even more pernicious form—in [the merit system]."⁸²

The 1986 California retention elections are often cited as an example of business interests and special interest groups pouring exorbitant amounts of money into a media campaign opposing a judge because of decisions protecting the rights of consumers, ten-

75. *Id.*

76. *See supra* note 32.

77. Dann & Hansen, *supra* note 22, at 1439 (citing KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 37 (1998)).

78. *Id.* at 1439 n.82.

79. Roy A. Schotland, *Summit on Improving Judicial Selection: Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1362-63 n.4 (2001).

80. *Id.*

81. Uniquely, California employs a "reverse merit selection system." The governor recommends candidates to the Commission on Judicial Nominees Evaluation (JNE or "Jenny Commission"), which then surveys attorneys and holds a confirmation hearing. *Eid, supra* note 6, at 71; *see* CAL. GOV'T CODE § 12011.5 (West 1992).

82. Harold See, *Comment: Judicial Selection and Decisional Independence*, 61 LAW & CONTEMP. PROBS. 141, 145 (Summer 1998).

ants, and employees.⁸³ This characterization, however, is slightly misleading because a significant portion of the more than \$6 million raised in opposition to the justices came from small contributions by individuals.⁸⁴ Some commentators have instead chosen to characterize the 1986 California retention elections as an instance of overwhelming grassroots opposition to the justices based on “genuine, strong, and widespread outrage at a justice who put herself above the law.”⁸⁵

The California election is just one example of how retention elections and nominating commissions are unable to insulate judges from the will of governors or interest groups. Tennessee Supreme Court Justice Penny White lost her 1996 retention election based entirely on her decision in one death penalty case, *State v. Odom*.⁸⁶ The Republican Party and the Tennessee Conservative Union led a campaign of radio and direct mail that ultimately defeated White and secured a vacancy on the court for Governor Don Sundquist to fill.⁸⁷ After White’s defeat, Sundquist emphasized the blow that he had succeeded in striking to judicial independence: “[s]hould a judge look over his shoulder about whether they’re going to be thrown out of office? I hope so.”⁸⁸

Other retention elections have also resulted in judges being voted out of office based on specific decisions or opinions as opposed to a pattern of misconduct or overstepping the bounds of judicial authority. In 1996, Nebraska Supreme Court Justice David Lanphier was defeated by opposition efforts based on a series of decisions redefining the state’s second-degree murder statute and his rejection of term limits for Nebraska officials.⁸⁹ In 1998, two California Supreme Court justices were opposed in their retention

83. See, e.g., Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1986-87 (1988); Faulkner, *supra* note 60, at 1279.

84. Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2038 (1988).

85. Schotland, *supra* note 79, at 1362-63 n.4.

86. 928 S.W.2d 18 (Tenn. 1996); Pamela Wade, *White’s Defeat Poses Legal Dilemma; How is a Replacement Justice Picked?*, COM. APPEAL, Aug. 3, 1996, at A1.

87. Wade, *supra* note 86, at A6.

88. *Id.* at A1.

89. Dann & Hansen, *supra* note 22, at 1435-36; Faulkner, *supra* note 60, at 1279 (citing Hansen, *supra* note 61, at 70).

elections by a \$2 million campaign in response to their decision in an abortion case.⁹⁰

These cases of contentious, highly financed retention elections show that the merit selection system does not go as far in creating an independent judiciary as its proponents might hope. In fact, a system of merit selection coupled with judicial retention elections can actually lead to less judicial independence than a system of popular judicial elections. The Penny White case in Tennessee presents a perfect example of how an ambitious governor, given a favorable political atmosphere, can create a vacancy on the bench with minimal effort. Retention elections remove the adversarial element from a campaign and leave a judge to face only whichever interest groups might be unhappy with his or her views. Judicial ethics preclude judges from saying or promising certain things in a race for office, but interest groups do not know such limitations. In many ways, it would be easier for an incumbent judge to face an actual challenger than be forced alone onto a pedestal to defend his past decisions to an inflamed public.

C. Weighing the Arguments

Retention elections only solve the problems of cost and majoritarian pressure when voter interest is low. When interest is high and issue politics enter the equation, as in the White and Lanphier cases, costs skyrocket and the political pressures associated with competitive elections rear their ugly heads once again. A judge who knows that he must soon present himself to voters will be equally sensitive to majoritarian pressure surrounding a controversial issue in front of him regardless of whether he is to stand for retention or run for re-election against a challenger.

Merit selection systems present an odd paradox. In order to maintain judicial accountability, retention elections are a necessary element. However, when retention elections generate significant public interest, then judicial independence is possibly in greater danger than if there were competitive elections. Yet, when retention elections generate little or no interest, then the effort at accountability proves to be merely a façade. In addition, merit selection systems create a mechanism that can be used by the executive and/or legislative branches to perpetuate the back-slapping, white-male-dominated political structure.

At best, merit selection can be described as modified appointment. At worst, it can be characterized as election by a small,

90. Dann & Hansen, *supra* note 22, at 1432; Faulkner, *supra* note 60, at 1279 (citing Hansen, *supra* note 61, at 69-70).

elite group.⁹¹ Merit systems like Alaska's attempt to strike a compromise between independence and accountability, but instead create the potential for the worst of both worlds. If voters do not care about retention elections, then the system has succeeded in making judges independent of the whims of popular opinion only at the cost of any measurable degree of democratic participation. However, if issue politics pique the interests of voters, then interest groups, journalists, and other politicians have free reign to lambaste a retention candidate for past decisions without presenting a contrasting alternative, as an opposing candidate would. Such a scenario does little to further the cause of judicial independence.

V. ALASKA MERIT SELECTION REVISITED

Most of the recent debate over merit selection and judicial independence has arisen in connection with efforts at reform in states that continue to hold contested judicial elections. Judicial elections in states such as Alabama and Mississippi have become highly contentious, exceedingly expensive, and generally nasty affairs.⁹² The American Bar Association has long supported the merit selection concept,⁹³ which has also been promoted by a wide array of judges, legal scholars, and commentators.⁹⁴ Reform efforts have generally failed with voters,⁹⁵ partly as a result of well-funded counter-campaigns by interest groups, primarily business interests, that have recently reconfigured their political activities to focus on the judicial branch of government (*i.e.*, judicial elections and tort reform).⁹⁶

So what is Alaska to make of the morass of arguments and counterarguments regarding judicial selection? Does current resistance to merit selection proposals in other states or the reemergence of big money and issue politics in retention elections suggest that Alaska reevaluate its own commitment to merit selection? Does Alaska's system of judicial selection allow for too much judicial independence at the expense of any meaningful judicial accountability, as some of its critics have contended?

91. Yuda, *supra* note 47, at 24.

92. See generally Terry Carter, *Boosting the Bench*, 88 A.B.A. J., Oct. 2002, at 28.

93. *Id.* at 32.

94. See, e.g., Daugherty, *supra* note 21, at 339-43; Eid, *supra* note 6, at 73; Yuda, *supra* note 47, at 19, 26.

95. See, e.g., Howard Troxler, *Merit-Based Selections Didn't Fly, Rightly So*, ST. PETERSBURG TIMES, Nov. 20, 2000, at 1B. In 2000, Florida voters rejected a merit selection plan for the state's trial court judges by a significant majority. *Id.*

96. See generally Carter, *supra* note 92.

A. Merit Selection and the Alaska Judicial Council in Practice

As of May 1999, “the Council had met approximately 92 times to nominate candidates to fill 165 judicial vacancies.”⁹⁷ “Since 1974, the Council has been evaluating judges standing for retention and making recommendations to voters.”⁹⁸ Neither Alaska law nor Council bylaws provide specific criteria by which judicial applicants and judges up for retention should be evaluated.⁹⁹ The Council’s general policy is “to prevent political considerations from outweighing fitness in the judicial retention process,” and it has endeavored to include as many groups as possible in the evaluation of judges and judicial applicants.¹⁰⁰ Evaluations are based on surveys of attorneys, peace and probation officers, social workers, court employees, and jurors.¹⁰¹ In addition, the Council compiles investigative materials specific to each judge and, since 1990, has held public hearings on “all judges standing for retention.”¹⁰² The Council’s evaluation information and recommendations are included in the Official Election Pamphlet that the Lieutenant Governor sends to every registered voter in the state and are posted on the Council’s website.¹⁰³

From 1984 to 1998, the Council recommended that all but one judge standing for retention be retained in office.¹⁰⁴ Data on judicial retention elections from 1976 to 1996 showed that, on average, the higher the rating bestowed upon a judge by the Council, the higher his or her affirmative vote percentage.¹⁰⁵ No judge seeking retention has been defeated since 1982,¹⁰⁶ and from 1984 to 1998, only 15% of judges received less than 64% “yes” votes.¹⁰⁷

Very few significant campaigns have been organized against individual judges. In 1964, the Alaska bar successfully campaigned against the retention of Alaska Supreme Court Justice Harry

97. FOSTERING JUDICIAL EXCELLENCE, *supra* note 24, at 6.

98. *Id.* at 10-11 (quoting AJC Bylaws, art. I, § 2).

99. *Id.* at 11.

100. *Id.* (quoting AJC Bylaws, art. I, § 2).

101. *Id.* at 12.

102. *Id.* at 13.

103. *Id.*

104. *Id.* at 11.

105. ESTERLING & SAMPSON, *supra* note 77, at 69-72.

106. In 1982, two district court judges, consistent with the Council’s recommendation, were not retained. FOSTERING JUDICIAL EXCELLENCE, *supra* note 24, at 14.

107. ESTERLING & SAMPSON, *supra* note 77, at 20.

Arend.¹⁰⁸ In addition, various grass roots efforts have developed against particular judges,¹⁰⁹ the most recent example of which is the 2000 attempt to defeat Alaska Supreme Court Chief Justice Dana Fabe's bid for retention.¹¹⁰ However, none of these efforts have succeeded in ousting a sitting judge and none have been characterized by the big money and high-profile negativity of anti-retention campaigns in other states.

In addition to the absence of big-money politics, Alaska's retention elections have also avoided a national trend involving the percentage of "yes" votes in retention elections. Studies have shown that the percentage of affirmative votes cast in judicial retention elections has consistently declined since the early 1960s.¹¹¹ In contrast, the percentage of Alaska voters casting affirmative votes in judicial retention elections remained remarkably constant between 1984 and 1998, as illustrated in the following table.

108. *Id.* at 14 n.36 ("as part of an effort to politically limit the supreme court's authority over Bar activities").

109. *Id.* at 14.

110. Chief Justice Fabe was targeted because of two controversial cases decided by the Alaska Supreme Court. See Ruth Ewig, Letter to the Editor, "No" on Fabe, ANCHORAGE DAILY NEWS, Nov. 4, 2000, at 9B; Ann Lohrey, Letter to the Editor, *Get Fabe off the Bench*, ANCHORAGE DAILY NEWS, Oct. 16, 2000, at 6B; see also *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 972 (Alaska 1997) (holding a state statute allowing hospitals to decline to provide abortion services "for reasons of moral conscience" unconstitutional as applied to a quasi-public hospital); *Area G Home & Landowners Org., Inc. v. City of Anchorage*, 927 P.2d 728, 739 (Alaska 1996) (interpreting an Anchorage city charter to allow the city to expand its police service area to include a new area that had previously voted against expansion, without giving residents of that area a separate vote on the expansion). Chief Justice Fabe wrote the court's opinion in the *Area G* case, 927 P.2d at 729, but she did not participate in the decision of the *Valley Hospital Ass'n* case, 948 P.2d at 973. Chief Justice Fabe was retained with a 57% "yes" vote. State of Alaska, Division of Elections, Election Summary Report, State of Alaska General Election 2000, at 7, available at <http://www.gov.state.ak.us/litgov/elections/elect00/00genr/data/results.pdf> (last visited Mar. 14, 2003).

111. Larry T. Aspin & William K. Hall, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 344 (1987); Larry T. Aspin & William K. Hall et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 4 (2000); Daugherty, *supra* note 21, at 323-25.

Table 1 – Alaska Vote Percentages by Year¹¹²

Year	# Judges	Yes Vote (%)
1984	22	69
1986	18	71
1988	17	69
1990	18	68
1992	15	64
1994	25	66
1996	13	69
1998	13	69

Commentators have attributed the observed national decline in affirmative votes to a corresponding general decline of public trust in the government.¹¹³ Whatever the cause, this does not appear to be a pronounced problem in Alaska.

Alaska's judiciary does, however, suffer from one negative characteristic often attributed to merit selection systems—disparate representation of women and minorities. Of Alaska's forty-one sitting judges, only nine are women and only two are of minority status.¹¹⁴ Both minority judges and eight of the nine female judges are at the superior court level.¹¹⁵ Given the makeup of the state's population,¹¹⁶ the absence of any state judges of Native American descent is especially disconcerting.

B. The Argument For and the Attempted Redemption of Judicial Elections

The primary criticism of judicial elections is that they are inherently in conflict with the notion of judicial independence. Proponents of appointment or merit selection contend that because an

112. FOSTERING JUDICIAL EXCELLENCE, *supra* note 24, at 19.

113. ASPIN & HALL, *What Twenty Years of Judicial Retention Elections Have Told Us*, *supra* note 111, at 344.

114. American Judicature Society, "Judicial Selection in the States," <http://www.ajs.org/js/AK.htm> (last visited Mar. 14, 2003). Alaska has one African American superior court judge and one Asian/Pacific Islander superior court judge. *Id.* Alaska has no Native American or Hispanic judges at any of the three primary levels. *Id.*

115. *Id.*

116. Native Americans or Alaska Natives make up 15.6% of the state's population. U.S. Census Bureau, State and County Quick Facts, Alaska, at <http://quickfacts.census.gov/qfd/states/02000.html> (last visited Mar. 14, 2003).

elected judiciary is accountable to the majority, it cannot be relied upon to protect the rights of the minority. A judiciary system insulated from majoritarian pressures may uphold one bedrock of American democracy—individual rights, but it runs contrary to another—public participation.

The judicial function is undeniably different from the executive and legislative functions. It is not representative, but rather based on interpretation. However, judges do not and cannot operate in a cultural vacuum. Judges are part of the communities whose people come to their courts seeking justice. Their decisions reflect the values and ethics of those communities. Flawed as they may be, judicial elections foster a brand of justice that is both authoritative and responsive. Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court, has described the mutually educational experience that elective systems can provide:

Judges who are running for election take the time to ride with law enforcement officers, make rounds with social workers and doctors, visit schools and factories, and lunch with the fork-and-knife clubs and bar associations. These visits give a judge the opportunity to understand the legal system from the perspective of the users: litigants and lawyers Elections can increase the citizen's understanding of the judicial function and the need for judicial independence. The public's appreciation of and respect for judicial independence is, I think, the best way to ensure that the judiciary will remain independent.¹¹⁷

Despite the benefits of a popularly elected judiciary and notwithstanding Jefferson's fear that "the office of a good judge [is] to enlarge his jurisdiction" would hold true in a judicial system independent of the nation,¹¹⁸ judicial elections are no longer desirable options in the modern political world. As early as 1906, Roscoe Pound observed that "compelling judges to become politicians . . . has almost destroyed the traditional respect for the bench."¹¹⁹ A number of options are available to states hoping to maintain systems of judicial elections while controlling the excesses and abuses that have come to be associated with them. Almost all states have ethical provisions relating to statements made by candidates for judicial office¹²⁰ and many have campaign finance regulations specific

117. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 977 (2001).

118. THOMAS JEFFERSON, *Autobiography*, in THOMAS JEFFERSON, WRITINGS 74 (1984).

119. The Causes of Popular Dissatisfaction with the Administration of Justice, 8 BAYLOR L. REV. 1, 23 (1956) (reprinting a speech given by Pound to the American Bar Association).

120. See, e.g., MODEL CODE OF JUDICIAL CONDUCT, Canon 5 (2000).

to judicial candidates.¹²¹ However, the U.S. Constitution limits the effectiveness of such provisions in “civilizing” judicial campaigns. *Buckley v. Valeo*¹²² held that spending limits are constitutional only when accepted voluntarily as a condition on the receipt of public funds,¹²³ and likely prevents states from imposing any significant controls on the activities of interest groups.¹²⁴ Most recently, in *Republican Party of Minnesota v. White*,¹²⁵ the Supreme Court held unconstitutional a state ethical canon that prevented a candidate for judicial office from “announc[ing] his or her views on disputed legal or political issues.”¹²⁶ “If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”¹²⁷ Some commentators have gone so far as to say that contested judicial elections are no longer defensible in light of these interpretations of the First Amendment.¹²⁸

Many states have attempted to take the politics out of judicial elections by going to a nonpartisan format. These efforts have been criticized from a number of different perspectives. In 1913, then former President and future Chief Justice William Howard Taft argued that nonpartisan elections would magnify the problems of elective judiciaries because the lack of the filtering function performed by political parties would allow unqualified candidates to get on the ballot and get elected.¹²⁹ More recently, commentators have observed that party politics invariably resurface in nonpartisan elections in the form of partisan cues or contributions and endorsements by individuals or interest groups with readily identifiable partisan leanings.¹³⁰

121. See, e.g., *id.* Canons 3 & 5.

122. 424 U.S. 1 (1975).

123. *Id.* at 57 n.65.

124. It has been argued that, at least in the context of campaign finance regulations, judicial elections are distinguishable from legislative or executive elections, but such distinctions have been rejected. See *Suster v. Marshall*, 149 F.3d 523, 529-30 (6th Cir. 1998).

125. 122 S. Ct. 2528 (2002).

126. *Id.* at 2542.

127. *Id.* at 2541 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

128. Paul D. Carrington & Adam Long, *Selecting Pennsylvania Judges in the Twenty-First Century*, 106 DICK. L. REV. 747, 747 (2002).

129. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 723-24 (1995).

130. See generally Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1418-20 (2001).

Several states, most notably Wisconsin, have recently made efforts to enact public financing of judicial races.¹³¹ The case for public financing of judicial elections is much stronger than the case for funding legislative and executive races. Legislatures and executives are supposed to be representatives of the electorate. The problem with private financing of legislative and executive races is not that it enables contributors to influence decision-making, but that it allows “contributors to influence governmental decision-making more than other constituents.”¹³² In the context of judicial offices, however, any influence on decision-making is inappropriate. Forcing judges to raise money creates an appearance of impropriety, burdens the time and energy of judges, and also discourages qualified candidates from pursuing or remaining in judicial office.¹³³ Although held to be constitutional,¹³⁴ attempts at public financing have recently sputtered. Wisconsin’s program to publicly fund judicial elections currently suffers from significant financing problems as a result of decreasing taxpayer participation in the one dollar state tax return check-off system that funds the program.¹³⁵ In addition, voters in Missouri and Oregon, states that have a demonstrated history of support for campaign finance reform, recently rejected ballot initiatives that would have implemented public financing programs.¹³⁶

C. Balancing Independence and Accountability

Merit selection seeks to create a fair, just, and compassionate judiciary by striving to balance two possibly irreconcilable characteristics: judicial independence and judicial accountability. Alaska’s merit selection system is designed to ensure that the state’s judges are highly qualified and not selected as a result of popular or political whim, resulting in a system of initial selection that fosters a considerable amount of independence. Alaska’s system of retention elections is intended to provide both a degree of accountability because judges must face the public and a degree of

131. Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1476-78 (2001)(discussing the partisan nature of several judicial elections over the past several years).

132. *Id.* at 1472.

133. For a discussion of public funding options and alternatives, *see generally id.*

134. *See Dagget v. Comm’n on Gov’t Ethics & Election Practices*, 205 F.3d 445, 459 (1st Cir. 2000).

135. Geyh, *supra* note 131, at 1477-78 & apps. B & C.

136. Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1505 (2001).

further independence because the judges appear on the ballot unopposed. Some critics might argue that Alaska has allowed for too much judicial independence at the expense of any meaningful accountability, while others might contend that Alaska has failed to provide adequate judicial independence by not insulating judges from voters entirely.

The goal of any process of judicial selection should be a fair, just, and compassionate judiciary. Judicial independence is an important, perhaps necessary, approach to the attainment of such a court system, but it is not the ultimate goal. Judicial independence might be better conceived of as a means to an end, rather than the end itself. Any system of judicial selection, evaluation, or retention will inherently hinder judicial independence.¹³⁷ However, judicial independence requires neither a system that maintains judges in office indefinitely, nor that judges be completely insulated from the will of the public.

Depending on one's point of view, the fact that very few judges have been turned out by Alaska voters in retention elections might indicate that the merit selection system is an excellent method of choosing talented and qualified judges. Alternatively, it might indicate that the system of retention elections weighs too heavily in favor of incumbent judges. There is some empirical data to support the former proposition,¹³⁸ and the experiences of other states with high profile, big-money retention votes weigh against the latter. Perhaps the strongest criticism of retention elections is that they do not effectively take interest and issue politics out of the judicial selection process and allow for well-financed interest groups to conduct vicious campaigns against relatively defenseless judges. This criticism would seem to suggest that retention elections do provide meaningful judicial accountability, perhaps even at the expense of judicial independence.

VI. INCREASING ACCOUNTABILITY IN ALASKA'S MERIT SELECTION SYSTEM

While Alaska's system of judicial retention may provide for a degree of accountability, its system of judicial selection is notably lacking in that respect. Alaska's merit selection system has served

137. One survey found that 28.2% of judges believed that their state's evaluation process undermined their independence as judges. *ESTERLING & SAMPSON, supra* note 105, at 44 tbl.IV-7 (Two of the nine Alaska judges in the survey believed that the Council's method of evaluation undermined judicial independence).

138. *FOSTERING JUDICIAL EXCELLENCE, supra* note 24, at 33-67, 69.

the state well and has been cited by experts as a model program of its kind.¹³⁹ However, as evidenced by recent criticisms,¹⁴⁰ the system does allow for a great deal of judicial independence with little corresponding accountability. The following are proposed measures to increase the degree of accountability to which Alaska judges are held without sacrificing a great deal of judicial independence.

A. Election of Attorney Members of the Alaska Judicial Council

Under the Alaska merit system, the Board of Governors of the Alaska Bar Association appoints the three attorney members of the Council.¹⁴¹ The purpose of this provision was to give the integrated bar the opportunity to be represented and heard regarding who would sit on the bench.¹⁴² A system of appointment by the Board of Governors, while likely efficient and uncomplicated, has the potential of narrowing the opinions and views of the bar that are actually represented on the Council. The attorneys who are appointed to the Council owe their positions to the governing powers in the Alaska bar and will almost surely represent the views of the state's most powerful and successful lawyers. This system of selecting Council members gives rise to the same accountability-independence problem that makes judicial selection so problematic.

The Alaska Constitution should be amended so as to provide for the election of the three attorney members of the Council by the entire Alaska bar. Each member of the Alaska Bar Association should be able to vote for candidates for Council positions, ensuring that the views of all practicing attorneys are represented in the judicial selection process. One possible objection to the election of attorney Council members might be that such a system would bring politics back into judicial selection. This criticism is unfounded, however, since only attorneys would be voting, and they would presumably be more informed than the general public about the law, what qualities make for a good judge, and which members of the bar are most qualified to sit on the Council.

139. *Id.* at 69 (“[T]he high quality of Alaska’s bench suggested in turn that the Judicial Council’s selection process has, over the past fourteen years, succeeded in identifying highly qualified judicial applicants.”).

140. For an account of criticisms of Alaska’s current system of judicial selection, see *supra* notes 34-45 and accompanying text.

141. ALASKA CONST. art. IV, § 8.

142. Minutes, *supra* note 51, at 590.

B. Increased Legislative Participation

Certain members of the Alaska legislature have objected to its almost non-existent role in judicial selection.¹⁴³ Under Alaska's merit system, the legislature's only participation in the judicial selection process comes in the form of voting to confirm the governor's nominations to fill the three layperson positions on the Alaska Judicial Council.¹⁴⁴ The role of the legislature could be increased within the framework of the current merit system in one of three ways: (1) provide for confirmation by the Alaska legislature of judicial appointees; (2) provide for confirmation by the Alaska legislature of attorney members appointed to the Council by the Alaska bar; or (3) spread the power to appoint non-attorney members to the Council among three different elected officials.

First, requiring judicial appointees to be confirmed by the legislature would be repetitive and could create an arena for political grandstanding. The federal system of judicial selection relies on the Senate to be a check against the President's exercise of his appointment power. Senate confirmation hearings on judicial nominees are designed to assess the qualifications and integrity of the nominee. Of course, recent confirmation hearings have become highly politicized, but they still serve their basic constitutional purpose.

Legislative confirmation would serve a different purpose when used in conjunction with a traditional merit selection system. Giving the state legislature the power to examine and confirm individuals already approved by the Council and appointed by the governor would be repetitive and pointless. The nominating commission would have already served as a screening process, one which presumably approved of the candidate's qualifications. The only purpose that confirmation hearings could serve would be a reassurance that the governor and the nominating commission were not collaborating to get an inferior or inappropriate candidate on the bench.

The second option, legislative confirmation of attorneys appointed to the Judicial Council, would also be repetitive and would undermine the voice of the Alaska bar in the judicial selection process. The point of having positions on the Judicial Council specifically designated for attorneys is to ensure the presence of the indi-

143. See, e.g., S.J. Res. 15, 21st Leg., 1st Sess. (Alaska 1999) (inserting provisions giving the legislature more control over the appointment and confirmation process); Press Release, *supra* note 35 (citing a need for the legislative and executive branches to place checks on the judiciary's growing power).

144. ALASKA CONST. art. IV, § 8.

viduals most familiar with the field and the potential candidates. Legislative confirmation would do nothing to serve this purpose and would only lead to delay and confusion.

Both of these options also create a forum for interest group politics to regain influence in the judicial selection process. Alaska's merit selection system has done an admirable job of avoiding the political spectacle that often characterizes the federal appointment process and judicial elections in many states. For example, Alabama Supreme Court races have been described as "battleground[s] between businesses and those who sue them,"¹⁴⁵ and judicial selection processes in Idaho, Illinois, Michigan, Mississippi, Nevada, Ohio, South Carolina, and Texas have all been beset by waves of political activity and campaign contributions by trial lawyers, civil defense lawyers, law enforcement associations, insurance companies, labor unions, and business, environmental, and religious groups.¹⁴⁶ Additionally, an increasing amount of this activity has been spearheaded by national rather than local organizations.¹⁴⁷ The Alaska bar is the only interest group¹⁴⁸ that is currently afforded the opportunity to participate in the judicial selection process. Other interest groups must wait until retention elections, three years after the fact, to weigh in on particular judges and their positions.¹⁴⁹

While the first two options are fraught with pitfalls, the third option—spreading the power to appoint non-attorney Council members among three elected officials—is intriguing and very

145. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656 (1999) (citing David White, *Campaign Cash Ready to Flow: Siegelman Has a Jump on James*, BIRMINGHAM NEWS, Mar. 26, 1998, at 1B).

146. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1395-1403 (2001).

147. *See id.* at 1399.

148. In fact, it is somewhat cumbersome to even consider the Alaska bar as a single interest group. The Bar Association represents a number of competing interest groups who, if they were allowed to participate in the process directly, would likely take opposing positions (*e.g.*, trial lawyers and civil defense attorneys or prosecutors and criminal defense attorneys).

149. Theoretically, interest groups could seek to assert their influence at two other levels: (1) the governor's nomination and the legislature's confirmation of the three non-attorney Council positions; and (2) the governor's final appointment decision from among the slate of nominees presented by the Council. However, these two occasions for action are very limited. Even assuming that a particular interest group was able to gain the support of the governor and a majority of the legislature, that would still not create a veto point since a majority of the seven-member Council would still be outside of that group's realm of influence.

practical. Currently, the governor appoints three non-attorney members to the Judicial Council. These individuals are intended to represent the views and interests of the public in the judicial selection process. Nothing in their purpose inherently requires that they be appointed by the governor. In fact, the governor's power over the non-attorney judicial council members is part of what creates the potential for cronyism and undue influence in the judicial selection process.

The Alaska Constitution could be amended to give the governor, the speaker of the house, and the president pro-tempore of the Senate the power to each appoint one non-attorney to the Judicial Council. This would give the legislature more direct say in the composition of the Judicial Council, decrease the potential for cronyism, and increase the points of view represented on the Council.¹⁵⁰ This change would weaken the political influences bearing on the Judicial Council by making them more diverse, and thus less acute.

C. Ethical Rules and Standards in the Judicial Selection Process

If the members of the Alaska Judicial Council are supposed to ignore politics and refrain from considering certain things, then it would be beneficial to provide a code of conduct for Judicial Council members listing specific "do's" and "do not's." For example, a rule prohibiting members from discussing the work of the Judicial Council once a vacancy arises would protect the public image of the process and allow the Council to function free of encumbrances. Likewise, a rule prohibiting the governor (or any other elected official granted the power of appointment) from discussing a "litmus test" or other approach to evaluating judicial candidates with potential nominees to the Council would ensure that Council members focus on the merits of individual applicants. Additionally, there could be a rule proscribing Council members from employing "litmus tests" themselves in evaluating applicants. These rules would obviously be difficult to monitor and enforce, but their very existence would lend credibility to the process and clarify what is expected of the Judicial Council and those who interact with it.

D. Increased Transparency in the Selection Process

The desire of the public and some lawmakers for a more accountable judiciary is largely the result of unfamiliarity with the ju-

150. A similar proposal was considered by the Missouri legislature in the early 1990s. Daugherty, *supra* note 21, at 329 & n.100.

dicial process. The greatest threat to democratic government is an ignorant and apathetic populace. Increased access to and awareness of the functions of the Judicial Council and the courts in general will go a long way toward increasing public confidence in the judiciary. The Alaska Judicial Council is already recognized across the nation as a leader in evaluating judges and distributing that information to voters in connection with retention elections.¹⁵¹ There is no reason to believe that the Council could not be equally effective in informing the general public about the initial merit selection process.

Additionally, the Judicial Council could open interviews of candidates to the public and the press. The Judicial Council could use television, radio, and newspapers to distribute information about retention elections and the selection process. The Alaska courts could expand the use of cameras in the courtroom to better familiarize the public with the workings of the judicial system and the role played by judges. The judiciary cannot rely on interest groups to focus attention on retention elections. Instead, voters must become more knowledgeable of the issues involved in retention elections beyond inflammatory issue politics.

VII. CONCLUSION

Experience has proven judicial independence to be an illusive goal. What or whom should the judiciary be independent of—the voting electorate, the power elite, or both? How and to whom should judges be held accountable, if at all? These questions have been debated since the founding of this nation and emphasize the competing notions of democratic theory on which our nation is based. Which system of judicial selection is best in a given context depends in large part on the particular society at hand, and even, to a certain extent, the particular point in time.

Any method of selecting judges will inherently undermine judicial independence. The question then becomes—should we have greater faith in the ability of the many (the electorate) to choose judges, or the few (elite commissions or political officials)? A meaningful commitment to judicial accountability allows for voter input, increases public awareness of the operations of the judicial system, and prevents political cronyism from taking hold of the administration of justice. Judicial accountability may cause judges to be influenced by the twists and turns of public opinion, but per-

151. See generally Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375 (2001); ESTERLING & SAMPSON, *supra* note 105; Troxler, *supra* note 95.

haps that is a good thing. Law is supposed to be an expression of the culture, values, and sentiments of the society that it governs. “[W]e should look with more of hope and confidence than of doubt and apprehension to the working of an elective judiciary [T]he people will support [judges] who oppose their wishes on the bench when such opposition is exercised conscientiously. Boldness men admire, even when opposed to their wills”¹⁵² Alaska’s system of judicial selection and retention reflects a meaningful commitment to judicial independence. Alaska must now ensure that it has made an equally strong commitment to judicial accountability within the framework of its system of merit selection.

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152. Abrahamson, *supra* note 117, at 1003-04 (quoting public debate over the Wisconsin state constitutional provision for electing judges) (citations omitted).